(19)

Supreme Court, U.S.
FILED
MAR 13 1998
CLERK

No. 97-454

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL, INC.), ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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24 pp

TABLE OF CONTENTS

		Page
I.	A parent corporation that actively participated in, and exercised control over, the operations of a subsidiary may be held liable under CERCLA as an operator of the subsidiary's facility	2
II.	CPC misconstrues Section 107(a)(2)	3
III.	Aerojet raises issues that are not properly before this Court	20

TABLE OF AUTHORITIES

Cases:

Aluminum Co. of America v. *Beazer East, Inc.*, 124 F.3d 551 (3d Cir. 1997) 17
Atherton v. *FDIC*, 117 S. Ct. 666 (1997) 13
Bailey v. *United States*, 516 U.S. 137 (1995) 2
Caterpillar, Inc. v. *Lewis*, 117 S. Ct. 467 (1996) 20
Chicago, M. & St. P. Ry. v. *Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490 (1918) 5
Dunn v. *CFTC*, 117 S. Ct. 913 (1997) 15
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987) .. 19
Huddleston v. *United States*, 485 U.S. 681 (1988) ... 7
Massachusetts v. *Morash*, 490 U.S. 107 (1989) 14
Old Chief v. *United States*, 117 S. Ct. 644 (1997) .....
O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994) 7
Pullman's Palace Car Co. v. *Missouri P. Ry.*, 115 U.S. 587 (1885) 5
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 11
Regents of the University of California v. *Doe*, 117 S. Ct. 900 (1997) 20
Rosenberger v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995) 16
Toibb v. *Radloff*, 501 U.S. 157 (1991) 11
United States v. *Johnston*, 268 U.S. 220 (1925) 19
United States v. *Wells*, 117 S. Ct. 921 (1997) 12

Cases—Continued: Page

United States v. *Wells Fargo Bank*, 485 U.S. 351 (1988) 11
Walters v. *Metropolitan Educ. Enter., Inc.*, 117 S. Ct. 660 (1997) 9, 10

Statutes and rule:

Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 *et seq.*:
§ 101(20), 42 U.S.C. 9601(20) 6
§ 101(20)(A), 42 U.S.C. 9601(20)(A) 4, 6, 9
§ 101(20)(A)(iii), 42 U.S.C. 9601(20)(A)(iii) 8
§ 101(20)(E), 42 U.S.C. 9601(20)(E) (Supp. II 1996) 6
§ 101(20)(E)-(G), 42 U.S.C. 9601(20)(E)-(G) (Supp. II 1996) 9
§ 101(20)(F)-(G), 42 U.S.C. 9601(20)(F)-(G) (Supp. II 1996) 10
§ 101(9), 42 U.S.C. 9601(9) 2
§ 101(21), 42 U.S.C. 9601(21) 2, 8, 11
§ 107, 42 U.S.C. 9607 12
§ 107(a), 42 U.S.C. 9607(a) 12, 15
§ 107(a)(2), 42 U.S.C. 9607(a)(2) ..... *passim*
§ 107(b)(3), 42 U.S.C. 9607(b)(3) 20
Fed. R. Civ. P. 52(a) 18

Miscellaneous:

142 Cong. Rec. (daily ed. Sept. 30, 1996):
p. S11,897 10
p. S11,920 10
W. Douglas & C. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L. J. 193 (1929) 16
E. Latty, *Subsidiaries and Affiliated Corporations* (1936) 12, 14, 16
J. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. Chi. L. Rev. 589 (1975) 16
Note, *Liability Of A Corporation For Acts Of A Subsidiary or Affiliate*, 71 Harv. L. Rev. 1122 (1958) ... 12, 16

Miscellaneous—Continued: Page

Restatement (Second) of Agency (1958) 14
The Oxford English Dictionary (2d ed. 1989) 4
Webster's Third New International Dictionary (1967) 5

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The United States submits that the private respondents "operated" the Muskegon site, within the meaning of Section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607(a)(2), because they each actively participated in, and exercised control over, the running of that facility. The government's submission rests on the ordinary meaning of the term "operated" and other textual indicia of congressional intent. Respondent Bestfoods (formerly CPC International, Inc. and designated CPC here) answers by embarking on a legal odyssey that takes the Court to many remote areas, but avoids calling on the ordinary meaning of the controlling statutory term. Respondent Aerojet-General Corporation argues that only

CPC is liable at the site, and goes on to address questions that are not before this Court. Because respondents have obscured the key issue, we begin by briefly restating the government's position and then turn to respondents' specific contentions.

I. A Parent Corporation That Actively Participated In, And Exercised Control Over, The Operations Of A Subsidiary May Be Held Liable Under CERCLA As An Operator Of the Subsidiary's Facility

The question before the Court is purely one of statutory construction. Section 107(a)(2) of CERCLA imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. 9607(a)(2). Section 101 of CERCLA defines the term "person" to include a corporation (42 U.S.C. 9601(21)), and the term "facility" to include "any site or area" where a hazardous substance has come to be located (42 U.S.C. 9601(9)). CERCLA accordingly imposes liability on respondent corporations CPC and Aerojet if they "operated" the Muskegon site.

CERCLA does not define the term "operated," and the term therefore retains its "ordinary and natural meaning." *E.g.*, *Bailey* v. *United States*, 516 U.S. 137, 145 (1995). See U.S. Br. 20. Under ordinary English usage, to "operate" a facility includes to "direct the working of" or "manage" the facility. See *id.* at 20-21 (citing three authoritative English dictionaries). The United States has accordingly construed Section 107(a)(2) to impose direct liability on a "person," whether a corporation or an individual, if the person actively participated in, and exercised control over, the running of a facility. The United States' construction is not only firmly founded on the plain language of Section 107(a)(2); it is also consistent with every other indicium of congressional intent, see *id.*

at 21-28, and reflects the longstanding majority view of the courts of appeals, see *id.* at 28-31.

In accordance with that construction, the United States has sought to hold parent corporations liable for operating a subsidiary's facility in those situations in which the facts demonstrate that the parent corporation exercised actual control over the running of the facility. In this case, the United States proved at trial that the parent corporations, CPC and Aerojet, exercised such extensive control over the management and decisionmaking of their subsidiaries' facility that the parents had, in fact, operated the facility. The district court specifically so found. *E.g.*, Pet. App. 124a ("As with CPC's involvement with Ott II, Aerojet's participation and control over the board, management and decisionmaking at Cordova/California and Cordova/Michigan *shows that the parent operated the facility*." (emphasis added)). Under the United States' construction, CPC and Aerojet are liable precisely *because* the factual record shows that they directly participated in the operational decisions that caused the hazardous conditions at the Muskegon site. The State of Michigan and other States agree with that construction. See Mich. Br. 6-14; Minn. *et al.* Amici Br. 6-17.

II. CPC Misconstrues Section 107(a)(2)

A. CPC states at the outset that "the starting place" is "'the language of the statute'" (CPC Br. 15), but its argument quickly departs for destinations far removed from the statutory text. At each juncture, CPC directs the Court away from CERCLA's clear language and ultimately leads the Court into the thicket of state doctrines respecting "piercing the corporate veil."

1. (a). CPC concedes that the term "operated" must be given its "ordinary or natural" meaning (CPC Br. 15), but it assiduously avoids reliance on the precisely relevant dictionary definition of the verb "operate" (*id.* at 16-21). Rather, CPC tells the Court that the term "operator" is limited to "the person that directly runs a machine, a

business, or (as here) a disposal 'facility.'" CPC Br. 16. According to CPC, "[t]he only 'operating' that matters, therefore, is the actual physical 'operating' of the 'facility' where hazardous substances were placed." *Id.* at 18. CPC derives that definition by taking the Court on a field trip through unrelated federal and state statutes that use the term "operator" in different contexts. See *id.* at 16-18 (citing, for example, state motor vehicle statutes, agricultural credit laws, and an 1881 mining glossary). In CPC's view, the noun "operator" and the qualified noun "immediate operator" are actually synonymous, and it uses those terms interchangeably throughout its brief.[1]

CPC's novel usage is flawed for three fundamental reasons. First, Congress did not use the term "immediate operator." Indeed, the relevant statutory term is not the noun "operator" but rather the verb "operate." CERCLA defines an "operator" of a facility as "any person * * * operating such facility," 42 U.S.C. 9601(20)(A), and Section 107(a)(2) specifically uses the verb "operated," 42 U.S.C. 9607(a)(2). Hence, the fact that Congress or a state legislature may have given the noun "operator" a specialized meaning in a particular statutory context is irrelevant to Congress's use of the term "operator" in CERCLA. Instead, the ordinary meaning of the verb "operate" should control.

Second, authoritative English language dictionaries provide a specific definition of "operate" in the precise context—the operation of an industrial "site"—that embraces the situation here. Those definitions expressly state that the verb "operate" in that context includes managerial control. See, *e.g.*, *The Oxford English Dictionary* (2d ed. 1989) (defining "to operate" as "[t]o direct the working of; to manage"). Those dictionaries *do not*

[1] See CPC Br. 1 ("the immediate operator"); *id.* at 13 (nothing "suggests an intent to extend liability beyond those persons immediately 'operating'"); *id.* at 15 ("corporation that immediately operates a facility"); *id.* at 17 ("immediate" operator).

state that one must "directly run[]" or "physical[ly] operat[e]" the facility or site. See, *e.g.*, *Webster's Third New International Dictionary* (1967) (defining "to operate" as "to manage and put or keep in operation *whether with personal effort or not*" (emphasis added)).[2]

Third, CPC's construction would produce the absurd result that CPC would be entitled to control decision-making at the facility but others alone would be subject to liability for its decisions. Indeed, if CERCLA's use of the term "operator" were limited to the "immediate, on-site person[s]" who "directly run[]" and engage in the "actual physical 'operating'" of the facility (CPC Br. 16, 17, 18), then the United States would be limited to seeking cost recovery from the chemical plant's work force. Under CPC's usage, those individual workers—such as seamen (*id.* at 16), miners (*id.* at 17), family farmers (*id.* at 17 n.7), gas station attendants (*id.* at 17 n.8), dump truck drivers (*id.* at 18 n.9), and others who "engage[] * * * in the mechanical aspect of any process or activity" (*id.* at 18 n.11)—would be the "immediate, on-site person[s]" who "directly run[]" and "physical[ly] 'operat[e]'" a chemical plant (*id.* at 16, 17, 18).

CPC's position produces incongruous results because CPC refuses to acknowledge that Section 107 im-

[2] CPC reaches back to cases such as *Pullman's Palace Car Co.* v. *Missouri Pacific Ry.*, 115 U.S. 587 (1885), to demonstrate that a parent corporation does not necessarily "operate" a subsidiary's facility. CPC Br. 19. We have not contended, of course, that a parent *always* does so. See, *e.g.*, U.S. Br. 41, 44. By the same token, *Pullman's* does not stand for the proposition that a parent can *never* "operate" a subsidiary's facility. See *Chicago, M. & St. P. Ry.* v. *Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 500-501 (1918) (distinguishing *Pullman's*). Even the court of appeals rejected that proposition, see Pet. App. 12a, and CPC ultimately concedes that point as well, CPC Br. 33 n.20. The question here is *when* does a parent "operate" a subsidiary's facility. Congress indicated, by Section 107(a)(2)'s use of the unadorned term "operated" and other textual indications, U.S. Br. 22-25, that a parent does so when it actively participates in the management of the facility.

poses liability based on actual responsibility, not physical proximity. See U.S. Br. 26, 41. Section 107(a)(2) allows the United States to recover its cleanup costs from those entities that exercised managerial control over the running of the facility and the day-to-day decisionmaking that created the hazardous situation. CPC's liability as an operator should be determined on the basis of whether CPC participated in those managerial and decisionmaking activities. The district court specifically found that CPC exercised that type of "operational" responsibility at the Muskegon site. See Pet. App. 111a ("The evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator.").[3]

(b). CPC also errs in arguing (CPC Br. 19, 20, 45) that the government's construction of Section 107(a)(2) is flawed because the government seeks to hold CPC liable for "operating" the Ott II subsidiary and not for operating the subsidiary's facility. CPC confuses the *Section 107(a)(2) liability standard* with the government's *method of proof* in this particular case. The United States has consistently asserted that Section 107(a)(2) subjects CPC to liability because it actually exercised extensive managerial control over the Ott II *facility*. See U.S. Br. 17, 20-26, 34, 44. The United States proved at trial that CPC was liable under that standard by, among other

[3] CPC suggests in a footnote that CERCLA reflects a "statutory assumption that, in the run of cases, there would be only one 'owner' and one 'operator' of a 'facility' at any given time." CPC Br. 18 n.10. CPC is mistaken. As a matter of common experience, Congress was surely aware that a facility, like any commercial property, can be owned by more than one "person" or operated by more than one "person." As a matter of text, Section 101(20) specifically recognizes that a person may become liable as an operator by "participating in the management of a vessel or facility," 42 U.S.C. 9601(20)(A) and (E) (Supp. II 1996). That provision denotes that each of the persons that participates in management may be held liable as an "operator" of the facility. See U.S. Br. 22-25.

things, introducing evidence showing that CPC exercised extensive managerial control over Ott II *and* that Ott II's sole business from 1965 to 1968 was the running of the Muskegon site. That evidence showed that CPC's involvement in Ott II's management was so extensive that CPC necessarily exercised operational control over Ott II's only production facility. See *id.* at 8 & n.8, 45-47.[4]

The government was entitled to prove that CPC exercised control over the Muskegon site through the evidence that the government concluded was most persuasive, including evidence that CPC controlled Ott II at a time when, and under circumstances in which, that control necessarily resulted in control of the Muskegon site. See *Old Chief* v. *United States*, 117 S. Ct. 644, 653-654 (1997) (noting general rule that a party "is entitled to prove its case by evidence of its own choice"). There is nothing unusual in the government's meeting its evidentiary burden by introducing indirect or circumstantial evidence, or by introducing several elements of evidence that collectively establish the proposition to be proved. See, *e.g.*, *Huddleston* v. *United States*, 485 U.S. 681, 691 (1988).[5]

The district court clearly understood the difference between Section 107(a)(2)'s statutory standard and the government's method of proof. It expressly observed:

> As with CPC's involvement with Ott II, Aerojet's participation and control over the board, management and decisionmaking at Cordova/California and

[4] The United States also introduced evidence showing CPC's extensive control over Ott II from 1968 to 1972. The government, however, used only evidence relating directly to CPC's involvement in the operation of the Muskegon site. That specific evidence was persuasive for the same reason as the pre-1968 evidence—it showed that CPC exercised managerial control over that site.

[5] Indeed, the lender liability provisions, discussed at U.S. Br. 22-25 and pp. 9-10, *infra*, explicitly recognize the relevance of such evidence. See U.S. Br. 24-25.

> Cordova/Michigan *shows that the parent operated the facility*.

Pet. App. 124a (emphasis added). The district court properly concluded that the government's evidence was probative in meeting the government's burden under Section 107(a)(2).

(c). CPC next argues that a "parent corporation" should not be liable because Congress failed to use that specific term in defining what entities are "persons." CPC Br. 20-21. Congress plainly had no reason to do so. CERCLA's definitional provisions make clear that Section 107(a)(2)'s reference to "any person" includes any "corporation," CERCLA § 101(21), 42 U.S.C. 9601(21), and hence includes both parent and subsidiary corporations. Congress simply meant what it said: A "corporation" would be liable—without regard to its status as a parent or a subsidiary—if the corporation had in fact "operated" the facility in question.

2. CPC attempts to bolster its interpretation of "operator" through novel constructions of related CERCLA provisions. CPC Br. 21-24. CPC's constructions, however, are unpersuasive and ultimately demonstrate that CPC's interpretation is inconsistent with the language and structure of the statute as a whole.

CPC seeks support (CPC Br. 21-22) from Section 101(20)(A)(iii) of CERCLA, which provides that a person may be an operator of an orphaned or abandoned facility if that person "operated[] or otherwise controlled activities at such facility." 42 U.S.C. 9601(20)(A)(iii). As we explain in our opening brief, Congress added that provision to make clear that a person may be an "operator" if the person "controlled activities" at a facility after the facility had ceased operations. U.S. Br. 26-28. Section 101(20)(A)(iii) recognizes that the mere closing of a facility that is releasing toxic chemicals does not eliminate the public health hazards, and it ensures that an entity managing activities at a closed—and therefore technically non-operational—facility may be subject to

liability as an "operator." That provision in no way supports CPC's counter-intuitive proposition that a corporation that controlled activities at a fully operational chemical plant is insulated from "operator" liability. Congress employed the relevant words to eliminate a possible ambiguity, and that "is ample—indeed, admirable—justification for the inclusion of a statutory phrase." *Walters* v. *Metropolitan Educ. Enter., Inc.*, 117 S. Ct. 660, 665 (1997). See U.S. Br. 27-28.

CPC also attempts to distinguish away the lender liability provisions of CERCLA, which create an exemption in the definition of "owner or operator" for "a person, who, without participating in the management of a * * * facility, holds indicia of ownership primarily to protect his security interest in the * * * facility." CERCLA § 101(20)(A), (E)-(G), 42 U.S.C. 9601(20)(A), (E)-(G) (Supp. II 1996). Those provisions are revealing because they provide concrete guidance on Congress's understanding of the contours of CERCLA liability. The provisions indicate that a lender would not be liable as an "owner" by virtue of holding a security interest in the facility, but it could become liable as an "operator"—in accordance with the ordinary meaning of the verb "operate"—by "participating in the management" of a facility. U.S. Br. 22-25.

CPC contends that the government "cannot explain why parties like CPC, who do not hold any 'indicia of ownership' pertaining to a covered 'facility,' should be held liable as *operators* because they do not meet the criterion for an irrelevant *exemption* from *owner* [*sic*] liability." CPC Br. 22. CPC misstates the provision (the lender exemption refers to "owner or operator" liability) and, at the same time, misses the point. We submit that CPC is liable under Section 107(a)(2) because it "operated" the Ott II facility within the ordinary meaning of that word—it extensively participated in the management of that facility. See U.S. Br. 18-22. We cite Section 101(20)(A) as an additional textual indication that the ordinary meaning

of "operated" is the correct one. See *id.* at 22-25. The lender liability provisions make clear that an entity can become liable as an "operator" by "participating in management" and specifically refute CPC's strained notion that the term "operator" should include only some amorphous subset of what CPC calls the "immediate" or "actual physical" operators of the site. See CERCLA § 101(20)(F)-(G), 42 U.S.C. 9601(20)(F)-(G) (Supp. II 1996).[6]

Indeed, CPC cannot explain why Congress would subject a bank to liability for "participating in the management" of an unrelated company's facility, but not a parent that engages in the very same managerial acts with respect to its subsidary's facility. The answer is clear: Congress anticipated that both would be liable. Congress spelled out the specific scope of lender liability in greater detail in response to the request of the banking community, which recognized that some lending activities could fall within the ordinary meaning of "operate" and wanted to eliminate ambiguity over precisely what activities would constitute participation in management and, thus, operation. Cf. *Walters*, 117 S. Ct. at 665.

3. CPC next contends that the government's construction of the term "operate" to encompass managerial control is inappropriate because other federal statutes

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[6] There is no merit to CPC's argument that the 1996 amendments are unenlightening on Congress's intended meaning of the term "operate." CPC Br. 23. As we note in our opening brief, Congress enacted the 1996 amendments as clarifying legislation in response to judicial decisions that raised doubts about the scope of the lender exemption. See 142 Cong. Rec. S11,897 (daily ed. Sept. 30, 1996) (Sen. Smith) ("the language we are adopting today merely clarifies a liability outcome that was already intended by Congress"); *id.* at S11,920 (daily ed. Sept. 30, 1996) (Sen. D'Amato) (the amendment "clarifies and confirms the original secured creditor exemption"). At the same time, Congress did not revise the prevailing rule among the courts of appeals that a parent corporation may be held liable as an operator if it actively participates in, and exercises control over, the operations of a subsidiary's facility. U.S. Br. 28-31 (describing circuit court decisions).

"use 'control' as an explicit criterion for liability." CPC Br. 24. Relying on that contention, CPC embarks on another field trip through the United States Code. *Id.* at 24-25. That expedition avails nothing. Congress has expressed its intention through the ordinary meaning of the term "operate," and Congress's use of other words in other statutory contexts provides no basis for concluding that Congress did not mean what it said here.

4. CPC also relies on legislative history. CPC Br. 26-27. This Court, of course, does "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994). In any event, CPC's speculations about statutory provisions that Congress did *not* enact yield no reliable guidance. See, *e.g.*, *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 358 (1988). They provide no basis for construing the term "operated" contrary to its ordinary meaning. Compare *Toibb* v. *Radloff*, 501 U.S. 157, 162 (1991). See U.S. Br. 40-41.

B. CPC devotes Part B of its brief to its contention that "CERCLA does not evince clear intent to supplant the state common law of limited liability of corporations." CPC Br. 27-38. CPC's argument once again directs the Court away from the crucial statutory inquiry. CERCLA explicitly imposes liability on any "corporation" that "owned or operated" a facility at which hazardous wastes were disposed of. See CERCLA §§ 101(21), 107(a)(2), 42 U.S.C. 9601(21), 9607(a)(2). Congress has adopted by statute a uniform federal liability standard that should be interpreted and applied according to its plain terms. There is no need or basis for distorting the ordinary meaning of CERCLA's express terms through the introduction of state common law. See U.S. Br. 32-35.[7]

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[7] Contrary to CPC's implications, Congress's imposition of direct liability on a corporation is not inconsistent with state common law. As we note in our opening brief, a parent corporation is not insulated from liability for its *own* acts. See U.S. Br. 33 & n.19; see also, *e.g.*, E.

CPC's basic premise is that Congress must have intended CERCLA to incorporate state common law veil-piercing rules. See CPC Br. 27-30. CPC is simply wrong. CERCLA contains no hint of any intention to incorporate those rules. To the contrary, Section 107(a) sets forth a liability standard that applies "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b)." 42 U.S.C. 9607(a). That provision explicitly *precludes* parties from invoking state common law principles to avoid Section 107 liability. The presence of that provision is not surprising. Congress enacted CERCLA in light of the need for a comprehensive federal response to the problem of abandoned waste sites and the *inadequacy* of state law to deal with that problem. See U.S. Br. 40 & nn. 26-27.[8]

There is accordingly no basis for CPC's contention that Congress has left a gap in Section 107(a)(2) that should be filled by a state common law rule of decision. CPC's argument (CPC Br. 27-28) that the United States' interpretation of Section 107(a)(2) represents an attempt to fill that supposed gap with "federal common law" is simply a red herring. See also *id.* at 32-35. Indeed, CPC's reliance on federal receivership cases involving state causes of action, such as *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997); *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), rests on a basic misunderstanding of those cases.

The Court explained in *Atherton* that the term "federal common law" describes "a rule of decision that amounts, *not simply to an interpretation of a federal statute* or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision." 117 S. Ct. at 670 (emphasis added). Accord *O'Melveny*, 512 U.S. at 85 ("In answering the central question of displacement of California law, we of course would not contradict an explicit statutory provision."). In this case, unlike *Atherton* and *O'Melveny*, the rule of decision *is* provided by federal statute. The United States simply asks the Court to interpret Section 107(a)(2) according to the ordinary meaning of the statutory terms. CPC's contention is fundamentally flawed because it asks whether a federal common law or state common law rule of decision is appropriate—completely overlooking that it is unnecessary to fashion a common law rule of decision at all.[9]

CPC's remaining arguments in Part B of its brief, which challenge the propriety of applying Section 107(a)(2) as a federal rule of decision, are accordingly beside the point and warrant only a brief response.

1. CPC complains that "the government unjustifiably presumes that CERCLA silently displaces the common law treatment of dual officers." CPC Br. 30-31. CPC

Latty, *Subsidiaries and Affiliated Corporations* 1-2, 77-109 (1936); *id.* at 82-90 (explaining, for example, that a parent may be held directly liable for participating in a tort through its control of a subsidiary); Note, *Liability of a Corporation for Acts of a Subsidiary or Affiliate*, 71 Harv. L. Rev. 1122, 1123 (1958) ("An individual or corporation acting in a situation involving a corporation related by stock control may incur liability because of that relationship or wholly apart from any consideration of that relationship. The courts often fail to distinguish clearly between the two bases of liability.").

[8] Even in the absence of that provision, there would be no merit to the contention that Congress implicitly adopted state common law. While it is true that this Court "presumes that Congress incorporates the common-law meaning of the terms it uses," it does so only "if those terms have accumulated settled meaning under the common law and the statute does not otherwise dictate." *United States* v. *Wells*, 117 S. Ct. 921, 927 (1997) (internal quotation marks, ellipses, and brackets omitted). Section 107(a)(2)'s relevant term here—"operated"—has no settled common law meaning other than the ordinary meaning supplied by the dictionary.

[9] Indeed, in contrast to *Atherton* and *O'Melveny*, where the Court found that the relevant federal statutes explicitly preserved the applicability of state law except to the extent directly overridden, *Atherton*, 117 S. Ct. at 674-675; *O'Melveny*, 512 U.S. at 86-87, the opposite is true with respect to Section 107(a), which, as we have noted, explicitly limits the use of "any other provision or rule of law." 42 U.S.C. 9607(a).

erroneously assumes such a conflict. Section 107(a)(2) imposes liability on a parent that has actively participated in, and exercised control over, the running of a subsidiary's facility, and the question in each case is whether the evidence demonstrates such involvement. The presence of dual officers may be a relevant evidentiary consideration, just as it may be a relevant factor—as CPC later concedes (CPC Br. 39)—in a common-law veil-piercing analysis. If, for example, dual officers of the parent participate in managing a facility as agents of the parent, then the parent would be liable, even under state common law.[10]

2. Contrary to CPC's contention (CPC Br. 31), we do not at all contend that the "remedial" purposes of CERCLA should override the statutory text. See U.S. Br. 26. Rather, we have noted that our construction—which rests on the ordinary meaning of the key statutory word—is consistent with and implements CERCLA's "object and policy." *Ibid.* (citing *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989)). Congress has expressed its policy judgment through the words that it used in Section 107(a)(2), and this Court should respect that judgment by applying the statute according to the ordinary meaning of its terms.

3. CPC next attempts to distinguish cases in which this Court has recognized that Congress may impose liability without regard to state law principles respecting corporate form. CPC Br. 36-38. Those cases surely involve different statutes and distinguishable facts, but CPC's distinctions miss the point: Congress can and does impose federal liability standards that do not depend on

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[10] See, *e.g.*, Restatement (Second) of Agency § 12 (1958); see also *id.* § 14M cmt.; Latty, *supra*, at 85-86 ("A corporation can only act through its agents; if it manages a project it does so through its agents. If individuals who in one capacity are its agents are found managing an enterprise owned by it, one should have little trouble in inferring that the corporation is managing the enterprise.").

state law principles. In this case, Congress created a liability standard that applies "[n]otwithstanding any other provision or rule of law." CERCLA § 107(a), 42 U.S.C. 9607(a). Congress should be taken at its word. See U.S. Br. 35-39.

C. CPC devotes Part C of its brief to various policy arguments about why interpreting "operated" according to its ordinary meaning would lead to "untenable" results. CPC Br. 38-43. The Court, however, does not sit in judgment of congressional policy and should " 'apply the statute as Congress wrote it.' " *Dunn* v. *CFTC*, 117 S. Ct. 913, 916 (1997). CPC's policy arguments are, in any event, unpersuasive.

1. CPC contends (CPC Br. 38-39) that applying Section 107(a)(2) based on the ordinary meaning of "operated" will result in a "standardless" analysis that "would reach most parent corporations of actual 'operators.' " CPC is wrong on both counts.

Section 107(a)(2) subjects a "person" to liability—without regard to its status as a parent, subsidiary, or individual—if the person "operated" the facility. Construing "operated" according to its ordinary meaning does not make Section 107(a)(2) "standardless." It subjects corporations to the same standard that applies to individuals, partnerships, and other liable "persons." See U.S. Br. 31 n.17. That construction, coupled with the definitions contained in the lender liablity provisions, see *id.* at 24-25, provides concrete guidance by directing courts to examine whether the entity in question actively participated in, and exercised control over, a facility's operations. It also allows courts to take full account of the various factors that demonstrate whether or not a particular entity "operated" a facility. A standard that allows for careful attention to the facts—which CPC disparages as "*ad hoc* analys[i]s" (CPC Br. 38) —is salutary. Courts typically engage in individualized analysis when applying liability standards, and such

analysis is a proper and essential part of the judicial process.[11]

The approach that CPC urges—resort to the individual common law veil-piercing rules of the 50 States—would be no less "*ad hoc*." But it would certainly be far less consistent and predictable. CPC would require the federal courts first to determine the appropriate veil-piercing rule for each defendant under a conflict of laws analysis, then make non-authoritative determinations of the content of the notoriously uncertain state veil-piercing rules, and then apply the appropriate rule to each defendant. Contrary to CPC's portrayal (CPC Br. 40), state common law veil-piercing rules are neither clear, nor consistent, nor necessarily coherent. In this case (which presents a relatively simple CERCLA suit and no conflict of laws dispute), the en banc court was sharply divided over the question of the content of Michigan's veil-piercing rules. Compare Pet. App. 15a-16a with 45a-46a (Ryan, J., dissenting).[12]

There is also no basis for CPC's contention that Section 107(a)(2) "would reach most parent corporations." CPC Br. 38; see *id.* at 40-41. The district court distinguished between the situation in which there is an "investment relationship between a parent and its wholly owned subsidiary" and the situation in which a parent engages in "actual participation and control over a subsidiary's functions and decision-making." Pet. App. 107a. The district court found CPC liable as an operator because the government's factual record "demonstrates the high level of participation required for direct liability to attach to CPC under section 107(a)(2)." *Id.* at 110a.[13]

2. CPC next argues (CPC Br. 41-43) that construing "operated" in light of its ordinary meaning would have the "undesirable consequences" of subjecting CPC—and other entities that directly participated in, and exercised control over, the running of facilities that endanger public health—to liability for the cost of remedying the situation. There is nothing inherently "undesirable," however, in requiring corporations to pay for the harm that they cause. More fundamentally, the policy implications of a liability statute are a matter entrusted to Congress. Section 107(a)(2) expresses the *statutory* policy that those who are actually responsible for creating hazardous conditions—whether individuals or corporations—should bear the cost of response. See U.S. Br. 41.[14]

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[11] See, *e.g.*, *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) (noting that "sifting through the details" is part of "the hard task of judging" and that "judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case").

[12] Legal commentators have long recognized that the state "veil-piercing" decisions "defy any attempt at rational explanation." J. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. Chi. L. Rev. 589, 620 (1975). See, *e.g.*, Latty, *supra*, at 5-76; W. Douglas & C. Shanks, *Insulation from Liability through Subsidiary Corporations*, 39 Yale L.J. 193, 217 (1929) ("the contents of any rules which may be stated to help in the work of prediction are but shifting and faintly outlined at the best"); Note, *supra*, 71 Harv. L. Rev. at 1123 ("A distressing feature of [veil-piercing] cases is their general failure to articulate reasoned grounds of decision."); see also U.S. Br. 40 n.27.

[13] The courts of appeals have uniformly recognized that a parent or shareholder will be directly liable only upon such a showing. See, *e.g.*, *Aluminum Co. of America* v. *Beazer East, Inc.*, 124 F.3d 551, 562-565 (3d Cir. 1997); see also cases cited at U.S. Br. 28-31. Contrary to CPC's contention (CPC Br. 41), the United States has not advocated that parents may be liable based solely on the presence of dual officers. See U.S. Br. 44. Indeed, the United States has asserted that a parent is directly liable as an operator in only a small percentage of its pending CERCLA cases. The United States asserts a direct liability claim only where it has evidence that the parent exercised actual control over the subsidiary's facility.

[14] CPC's suggestion that subjecting parent corporations to liability will "create[] perverse incentives for parents to exercise less supervision over their subsidiaries" (CPC Br. 41) is contradicted by the facts of this case. As the district court found, CPC's involvement in Ott

3. CPC also contends (CPC Br. 43) that construing "operated" according to its ordinary meaning "would encourage the development of common law veil-piercing based on other statutory terms." CPC creates that parade of horribles out of its own erroneous reasoning. Just as this Court should not import inapposite principles into the CERCLA context (see pp. 4, 11, *supra*), it should also not export CERCLA principles to other inapposite statutory contexts.

D. CPC contends in the final portion of its brief that "CPC cannot be held liable as an 'operator' under any reasonable standard on this record." CPC Br. 43-50. CPC specifically asks this Court to evaluate CPC's liability based, not on the district court's factual findings, but rather on CPC's own view of the evidence. Indeed, CPC's statement of the case relies on its version of the evidence (see *id.* at 3-9) and largely ignores the district court's extensive findings (Pet. App. 58a-100a). That court considered CPC's factual arguments against the entire record and correctly rejected CPC's version of its role at the Muskegon site.[15]

This Court should decline CPC's invitation to resolve CPC's quarrels with the district court's factual findings. The Court granted the United States' petition to resolve a

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II's environmental and regulatory matters resulted in discouraging Ott II from undertaking a pollution control initiative and cooperating with environmental officials. Pet. App. 74a-76a. Contrary to CPC's assertions, subjecting parents to liability for their actions when participating in the management of a subsidiary's facility will create appropriate incentives for encouraging responsible decisions and actions.

[15] Not surprisingly, after a 15-day trial, involving 29 live witnesses, deposition testimony of dozens of others, and more than 2,300 trial exhibits, CPC can selectively cull evidence to portray a different situation from what the district court found. Compare, *e.g.*, Aerojet Br. 6-15. CPC's one-sided presentation does not, of course, establish that the district court's findings are "clearly erroneous." Fed. R. Civ. P. 52(a).

legal question respecting the scope of CERCLA liability, and not to "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). The court of appeals concluded below that the district court had applied an incorrect legal standard, but it did not reject, set aside, or even seriously question the district court's factual findings. See Pet. App. 2a.[16] Accordingly, for purposes of evaluating the legal issue in this proceeding, this Court should treat the district court's findings as conclusive. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

On the decisive legal issue, the Court should reverse the court of appeals' ruling. As we explain in our opening brief, the district court adopted the correct legal standard (U.S. Br. 18-41), and it correctly applied the legal standard to the facts that it found (*id.* at 42-48).[17]

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[16] CPC suggests, through a creative rewriting of the majority's decision, that the court of appeals noted a "dearth of factual support for the district court's broad conclusions." CPC Br. 44. That is inaccurate. The court of appeals did not contest the district court's factual findings; it simply indicated that additional facts would be needed to support liability under the court of appeals' legal standard. See Pet. App. 12a ("If anything, the facts recited by the district court support liability under the latter standard but not under the former."); *id.* at 16a-17a. The same holds true at the other pages CPC cites. See *id.* at 12a, 18a, 21a-22a, 24a.

[17] Whether the Court reverses or affirms the court of appeals' judgment, it may remand the case for further proceedings. If the Court reverses, CPC may be entitled to renew any undecided contentions respecting the district court's findings that it previously raised in the court of appeals. If the Court affirms, the United States may be entitled to an opportunity to establish liability under the standard the Court announces.

III. Aerojet Raises Issues That Are Not Properly Before This Court

Aerojet does not contest that a parent corporation may be found directly liable as an operator under CERCLA without piercing the veil. Aerojet Br. 24-27. Aerojet contends, however, that it cannot be held liable because, in its view, neither Aerojet nor its subsidiaries disposed of hazardous substances during their operation of the facility. *Id.* at 27-36. Aerojet also contends that it is entitled to the third-party defense under Section 107(b)(3) of CERCLA, 42 U.S.C. 9607(b)(3). Aerojet Br. 38-46.

Our foregoing reply to CPC also answers Aerojet's arguments about the particular standard that should be employed here. The other issues that Aerojet raises are not properly before the Court. Those issues, both of which were remanded to the district court for further evaluation and factual findings with respect to Aerojet's subsidiaries (Pet. App. 22a-24a), are not related to the question on which this Court granted certiorari. Although we believe that the district court made ample findings to support liability against Aerojet and its subsidiaries, the Court has no need to reach the remanded issues to resolve the question that has been presented for review. See *Regents of the University of California* v. *Doe*, 117 S. Ct. 900, 905 (1997); see also *Caterpillar, Inc.* v. *Lewis*, 117 S. Ct. 467, 473 n.7 (1996).[18]

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For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

MARCH 1998

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[18] Contrary to CPC's implication (CPC Br. 9 n.2), the United States has not entered into a settlement agreement with Aerojet and remains in an adversary posture with respect to both Aerojet and CPC.